

FILED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

UNITED STATES OF AMERICA EX REL.)
DRC, INC. AND ROBERT ISAKSON,)
)
Plaintiffs,)
)
v.)
)
CUSTER BATTLES, LLC, ET AL.)
)
Defendants.)
_____)

Case No. 1:04cv199

SUPPLEMENTAL BRIEF OF THE UNITED STATES

In December, the Court "**INVITED**, but [did] not require[]," [emphasis in original] the government "to file ... a brief setting forth the government's position with respect to whether the FCA [False Claims Act] applies to false claims made or presented to the CPA [Coalition Provisional Authority]." Order, Dec. 21, 2004. The government accepted the Court's invitation and on April 1, 2005, filed its brief stating the position of the United States: "Custer Battles's claims presented to the CPA under the BIAP and ICE contracts would violate the FCA if the claims are shown to have been knowingly false because those claims were for funds in which the U.S. had an interest or exercised certain dominion and were to be paid out, provided or approved by the United States and they were ultimately presented to an officer or employee of the United States government." Brief of the United States in Response to the Court's Invitation of December 21, 2004, at page 40.

In its Order of April 12, 2005, the Court "**DIRECTED**" [emphasis in original] the government to file a supplemental brief "on or before 5:00 p.m. on Friday, April 22, 2005"

answering a different question: "whether the CPA is an entity, agency, or instrumentality of the United States for the purposes of the False Claims Act." Order, April 12, 2005.

The United States considers the question of whether the CPA is an entity, agency, or instrumentality of the United States to be unnecessary to a determination of whether the FCA applies to the claims presented by the defendants to the CPA under the two contracts at issue in this litigation. The facts necessary to determine the applicability of the FCA are limited to those facts required by the terms of the statute. The statute does not require that false claims be presented to "an entity, agency, or instrumentality of the United States." Rather the statute only requires that false claims be presented "to an officer or employee of the United States Government or a member of the Armed Forces of the United States." 31 U.S.C. §3729(a)(1). The United States stated its position on the statutory element of presentment in its brief filed on April 1, 2005. Brief of the United States in Response to the Court's Invitation of December 21, 2004, at pages 23-24.

Nonetheless, to address the Court's most recent inquiry, the United States submits this supplemental brief.¹ Our discussion below is solely for the purpose of answering the Court's question with respect to the FCA, and not for any other purpose. In this connection, we would point out that, by way of example, the CPA would not be an agency under the Administrative Procedure Act (APA), including the APA's waiver of sovereign immunity (with the exception of the FOIA), because the APA exempts from the definition of agency "military authority exercised

¹ This filing is made pursuant to 28 U.S.C. § 517 which authorizes the United States to send any officer of the Department of Justice to "attend to the interests of the United States in a suit pending in a court of the United States, or in the courts of a State, or to attend to any other interest of the United States."

in the field in time of war or in occupied territory." 5 U.S.C. § 551(1)(G). This is but one example of other statutes not before the Court that we are not addressing.

The United States believes that the CPA is an instrumentality of the United States for purposes of the False Claims Act. The Supreme Court has held that the False Claims Act was enacted "broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made." *Rainwater v. United States*, 356 U.S. 590, 592 (1958). Ten years later the Court reiterated the broad scope of protection to be given to funds held by the government under the False Claims Act: "In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid restrictive reading. . . ." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968). The Court went on to conclude, "[t]his remedial statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 233. The breadth of the statute was confirmed by Congress in 1986 when it amended the Act to define a "claim" to include "any request or demand, whether under contract or otherwise, for money or property which is made to a . . . recipient, if the United States Government provides any portion of the money or property which is requested or demanded" 31 U.S.C. § 3729(c).

The Supreme Court analyzed some FCA cases by determining whether the FCA was violated when a defendant presents false claims to an entity with some connection to the United States government, but not the United States. *Rainwater v. United States*, *supra*, (claims against the Commodity Credit Corporation, a corporation wholly owned by the United States); *United States v. McNinch*, 356 U.S. 595 (1958) (claims against the Federal Housing Administration, an

unincorporated agency of the United States). These decisions, however, were based on the language of the FCA contained in an earlier version of the FCA. The codification of the False Claims Act in 1982 made clear, however, that all that is necessary for liability under both the pre- and post-1982 versions of the FCA is that the false claims be presented to a governmental official, and, thus, a determination of the nature of the CPA is not necessary to determine whether the FCA applies.² It is for that reason that the position of the United States on the applicability of the FCA to the defendants' claims did not require a discussion of the nature of the CPA. Nevertheless, considering the factors the Supreme Court pointed to in both *Rainwater* and *McNinch* is useful in addressing the latest question posed by this Court.

In *Rainwater*, the Court considered whether false claims submitted to the Commodity

² The language of the FCA before it was modified in 1982, when Title 31 of the United States Code was enacted into positive law, contained language about presenting false claims to "any department" of the United States. The official text of the statute at the time of these decisions was contained in the Revised Statutes. See, *United States v. Bornstein*, 423 U.S. 303, 305, n.1. The Act at that time imposed liability on any person "who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent." Rev. Stat. §§ 3490 and 5438.

The language in the current version of the statute only requires that the claim be presented "to an officer or employee of the United States Government or a member of the Armed Forces of the United States." Congress recognized that the language about "any department" was unnecessary when the 1982 codification dropped the language specifying that the claim be "upon or against the Government of the United States, or any department or officer thereof." Indeed, the House Report for the 1982 legislation specifically explained that "[t]he words 'upon or against the Government of the United States, or any department or officer thereof' are omitted as surplus." H.R. Rep. No. 97-651 at 143 (1982) *reprinted in* 1982 U.S.C.C.A.N. 1895, 2037. The conclusion that such language about "any department" is unnecessary to the liability determination is an interpretation that is also consistent with the stated intent of the 1982 codification of Title 31, ("An Act To revise, codify, and enact without substantive change certain general and permanent laws. . ." Pub. L No. 97-258, 96 Stat. 877, September 13, 1982).

Credit Corporation were actionable under the FCA. Again, without establishing an objective bright-line test, the Court nevertheless recited factors that led it to conclude that false claims presented to the Commodity Credit Corporation are covered by the FCA:

Commodity is an "agency and instrumentality of the United States, within the Department of Agriculture, subject to the general supervision and direction of the Secretary of Agriculture." It was created by Congress to support farm prices and to assist in maintaining and distributing adequate supplies of agricultural commodities. Its capital was provided by congressional appropriation. Any impairment of this capital, which at times has been great due to the nature of its activities, is replaced out of the public treasury; any gains are returned to that treasury. All of its officers and other personnel are employees of the Department of Agriculture and are compensated as such. Like other government corporations, Commodity is subject to the provisions of the Government Corporation Control Act which provides such close budgetary, auditing and fiscal controls that little more than a corporate name remains to distinguish it from the ordinary government agency. In brief, Commodity is simply an administrative device established by Congress for the purpose of carrying out federal farm programs with public funds.

Rainwater v. United States, supra, at 591-92.

In *McNinch*, the Court again used the individual circumstances of the creation and nature of the Federal Housing Administration (FHA) to conclude that false claims submitted to the FHA are covered by the FCA:

In our judgment the Court of Appeals plainly erred in holding that the FHA was not part of the "Government of the United States" for purposes of the False Claims Act. The FHA is an unincorporated agency in the Executive Department created by the President pursuant to congressional authorization. Its head, the Federal Housing Commissioner, is appointed by the President with the Senate's consent, and the powers of the agency are vested in him. The agency is responsible for the administration of a number of federal housing programs and operates with funds originally appropriated by Congress. In short, the FHA is as much a part of the Government as any agency can be.

United States v. McNinch, supra, at 598. Although the Supreme Court examined both *Rainwater* and *McNinch* based on their individual facts without enumerating specific factors

applicable to such cases generally, it is still possible to extrapolate a general set of criteria for determining whether an entity is part of the U.S. government for purposes of the FCA:

How and under what circumstances was the entity created?

Is the entity subject to the general supervision and direction of the Executive Branch?

Is its head appointed by the President and confirmed by the Senate?

Is the entity's funding or its capital formed or replaced out of the public treasury? And are any gains returned to the public treasury?

Are all of the entity's officers and other personnel employees of the United States?

Are there close budgetary, auditing and fiscal controls that resemble those imposed on the ordinary government agency?

Is the structure of the entity simply an administrative device established for the purpose of carrying out a federal program with public funds?

Taking them in order, if we apply each of these questions to the CPA, it does not yield an unequivocal answer to the Court's question of "whether the CPA is an entity, agency or instrumentality of the United States for purposes of the [FCA]."

The Circumstances of Its Creation. The CPA was created by the Commander of the Coalition Forces in Iraq, General Tommy Franks, United States Army, who was also the Commander of the U.S. Central Command. The establishment of the CPA by the Coalition was formally recognized by UNSCR 1483. Since the Coalition Forces had established and exercised actual authority over the territory of Iraq, under the laws of war and occupation, the authority of the defeated Iraqi regime of Saddam Hussein passed into the hands of the Coalition Forces. General Franks established the CPA under the laws of war to perform civil government functions

in liberated Iraq during the brief occupation.

The CPA, however, was not created or explicitly authorized by Congress. Moreover, Congress, almost six months after the CPA was established, regarded the CPA as having been "established pursuant to United Nations Security Council resolution including Resolution 1483." Emergency Supplemental Appropriations, 117 Stat. 1209, 1226.³ On the other hand, in the same Emergency Supplemental Appropriations Act, Congress included several provisions that tend to characterize the CPA as an entity of the United States. Congress appropriated money and authorized the President to "apportion" the money among several government departments and "the Coalition Provisional Authority in Iraq (in its capacity as an entity of the United States Government)." *Id.*, at 1225. Section 2208 provided,

Any reference in this chapter to the "Coalition Provisional Authority in Iraq" or the "Coalition Provisional Authority" shall be deemed to include any successor United States Government entity with the same or substantially the same authorities and responsibilities as the Coalition Provisional Authority in Iraq.

Id. at 1231. Thus, although Congress did not create the CPA, it nevertheless regarded it in certain respects as being an entity of the United States Government and recognized that it might be succeeded by a United States Government entity. Finally, in legislation enacted even later, Congress included the CPA as being among U.S. government organizations.⁴

³ The President stated upon signing H.R. 3289 (Public Law 108-106), the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, that "[t]he Act incorrectly refers to the Coalition Provisional Authority (CPA) as if it were established pursuant to U.N. Security Council resolutions. The executive branch shall construe the provision to refer to the CPA as established under the laws of war for the occupation of Iraq." Statement by the President on H.R. 3289, Nov. 6, 2003.

⁴ See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 1042(b)(2)(N), 118 Stat. 1811, 2050 (2004) (requiring the Secretary of Defense to

Supervision, Appointment, and Direction. The circumstances of the CPA's supervision indicate that it may be an instrumentality of the government. The CPA Administrator was subject to the direction of the President. Administrator Bremer served as Presidential Envoy and reported to the President through the Secretary of Defense.⁵ The Secretary of Defense in turn designated Ambassador Bremer as the Administrator of the CPA.

Funding. The CPA's operating funds were appropriated by Congress. Congress appropriated \$933,000,000 for the CPA's operating expenses through September 30, 2005, and \$50,000,000 for reporting and monitoring and maintenance of records. The President could also

submit a report containing a "description of the coordination, communication, and unity of effort between the Armed Forces, the Coalition Provisional Authority, other United States government agencies and organizations..."); and National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136 § 1203(b), 117 Stat. 1392, 1648 (2003) (requiring the Secretary of Defense to submit a report discussing the "evolution of the organizational structure of the civilian groups reporting to the Secretary, including ... the Office of the Coalition Provisional Authority, on issues of Iraqi administration and reconstruction" and "[t]he relationship of Department of Defense entities, including ... the Office of the Coalition Provisional Authority").

⁵ The President's letter of appointment for Ambassador Bremer of May 9, 2003 stated:

Exercising my constitutional authority as Commander in Chief, and consistent with pertinent statutes, I hereby appoint you to serve as my Presidential Envoy to Iraq, reporting through the Secretary of Defense. Subject to the authority, direction, and control of the Secretary of Defense, you are authorized to oversee, direct, and coordinate all United States Government (USG) programs and activities in Iraq, except those under the command of the Commander, U.S. Central Command. This authority includes the responsibility to oversee the use of USG appropriations in Iraq, as well as Iraqi state-or regime-owned property that is properly under U.S. possession and made available for use in Iraq to assist the Iraq people and support the recovery of Iraq. You and the Commander, U.S. Central Command, will communicate fully and continually, and cooperate in carrying out your respective responsibilities.

By memorandum of May 10, 2004, entitled "United States Government Operations In Iraq", the President directed: "The CPA shall terminate not later than June 30, 2004."

apportion up to approximately \$186 million out of the \$18.6 billion for the IRRF to the CPA for its operating expenses. Those operating appropriations that remained when the CPA was terminated were to be transferred to the Department of State.

The CPA, on behalf of the Iraqi people, also managed more than \$20 billion in funds derived from other sources, including vested and seized funds and the Development Fund for Iraq.⁶ The balance of these assets remaining at the time of the CPA's termination, including those in the Central Bank of Iraq, was transferred to the Iraq Ministry of Finance, although there still remain some Vested Funds in the Treasury account, (the current balance of the Treasury account is \$280.51), and some relatively small amount of Seized Funds remains under the possession and control of the United States as a member state of the Coalition.

Employment of Its Personnel. Many if not most officers and employees of the CPA were employees of the United States.⁷ Others were employees of other member states of the Coalition.

Budgetary, Auditing, and Fiscal Controls. At the time the two contracts at issue here were entered into, the U.N had determined that the DFI was
to be audited by independent public accountants approved by the International

⁶ A more detailed discussion of these funds is contained in the Brief of the United States in Response to the Court's Invitation of December 21, 2004.

⁷ Section 3001(e)(2) of the Emergency Supplemental Appropriations may be read as a Congressional indication that the CPA officers were of the same status as officers of U.S. Government departments. It provided that, "Neither the head of the Coalition Provisional Authority, other officer of the Coalition Provisional Authority, nor other officer of the Department of Defense, the Department of State, or the United States Agency for International Development shall prohibit the Inspector General from initiating, or from carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation." 117 Stat. at 1235.

Advisory and Monitoring Board of the Development Fund for Iraq ..., whose members shall include duly qualified representatives of the Secretary-General, of the Managing Director of the International Monetary Fund, of the Director-General of the Arab Fund for Social and Economic Development, and of the President of the World Bank.

UNSCR1483, ¶ 12.

While Congress initially imposed no close budgetary, auditing and fiscal controls over the CPA operations with regard to the DFI that resemble those imposed on the ordinary government agency, after the contract prices had been determined and defendants had partially performed, Congress created the Office of Inspector General for the CPA to perform those types of oversight functions. In November 2003, as part of the Emergency Supplemental Appropriation Act, in Title III, Congress created the CPA-IG to provide oversight of the CPA's operation and programs. 117 Stat. 1209, 1234.⁸

⁸ The President, in his statement upon signing the Act into law on November 6, 2003 said:

Title III of the Act creates an Inspector General (IG) of the CPA. Title III shall be construed in a manner consistent with the President's constitutional authorities to conduct the Nation's foreign affairs, to supervise the unitary executive branch, and as Commander in Chief of the Armed Forces. The CPA IG shall refrain the initiating, carrying out, or completing an audit or investigation, or from issuing a subpoena, which requires access to sensitive operation plans, intelligence matters, counterintelligence matters, ongoing criminal investigations by other administrative units of the Department of Defense related to national security, or other matters the disclosure of which would constitutes a serious threat to national security. The Secretary of Defense may make exceptions to the foregoing direction in the public interest.

Furthermore, when he signed into law the provisions in Public Law 108-375, relating to the follow-on Special Inspector General for Iraqi Reconstruction on October 29, 2004, the President reiterated:

Section 1203 of the Act creates a Special Inspector General for Iraq Reconstruction, under the joint authority of the Secretaries of State and Defense,

Of some interest, Congress redesignated the CPA-IG as the Special Inspector General for Iraqi Reconstruction (SIGIR) in the National Defense Authorization Act for Fiscal Year 2005, Pub.L. 108-375. Additionally, Congress modified the scope of SIGIR's responsibilities from having oversight over the operations of the CPA to having oversight over the activities funded with amounts appropriated or otherwise made available to the Iraq Relief and Reconstruction Fund. In any event, these are not the type of controls normally imposed on the ordinary government agency, and certainly whatever the budgetary, auditing, and fiscal controls the IG represented, they had little, if any, impact on CPA's use of the DFI.

As for controls that are normally imposed on the ordinary government agency's contracting procedures and requirements, those CPA contracts executed with vested, seized or DFI funds, which includes the BIAP and ICE contracts at issue in this litigation, were not subject to the Federal Acquisition Regulations (FAR) or any other federal requirements such as the Truth in Negotiations Act (TINA), 10 U.S.C. § 2306a. Thus, and perhaps more significantly here,

as a successor to the Inspector General of the Coalition Provisional Authority under title III of Public Law 108-106. Title III as amended by section 1203 shall be construed in a manner consistent with the President's constitutional authorities to conduct the Nation's foreign affairs, to supervise the unitary executive branch, and as Commander in Chief of the Armed Forces. The Special Inspector General shall refrain from initiating, carrying out, or completing an audit or investigation, or from issuing a subpoena, which requires access to sensitive operation plans, intelligence matters, counter-intelligence matters, ongoing criminal investigations by administrative units of the Department of Defense related to national security, or other matters the disclosure of which would constitute a serious threat to national security. The Secretary of State and the Secretary of Defense jointly may make exceptions to the foregoing direction in the public interest.

Thus, the President, in whom the Constitution vests the authority to "take Care that the Laws be faithfully executed," U.S. Const. Art II, § 3, recognized that he possessed, and exercised, constitutional authority to supervise as part of the unitary executive branch, the Inspector General of the CPA and the Special Inspector General for Iraq Reconstruction.

neither of the two contracts at issue here were governed by the FAR or TINA or similar U.S. contracting procedures, whether statutory or regulatory. The CPA established contracting procedures that are analogous to the competition, transparency, and accountability standards applicable to federally funded U.S. contracts. The CPA administered its contracts in much the same manner as the U.S. Army manages its contracts and utilized U.S. government contracting forms. That appears to be the case for the two contracts between defendants and the CPA at issue here. And, as described in our earlier brief, at least the flow of Vested and Seized funds was handled primarily by U.S. officials and employees and quite similarly to how contract funds are handled domestically.

Its Structure. The United States and the United Kingdom, and other member states of the Coalition were the occupying powers in Iraq under the laws and usages of war. The CPA was the administrative device that the Coalition created under the laws and usages of war to perform civil government functions in liberated Iraq during the brief period of occupation. As an active member of the Coalition, the United States played an important role in, and had certain responsibilities for, the occupation, which it chose to fulfill through creation of and participation in the CPA.

The CPA's structure was not established by Congress, and thus, the structure is not the typical congressionally created administrative device to fulfill a governmental function. The purpose of the CPA, however, was to exercise, under the laws and usages of war, the powers of government temporarily, and, among other things, thereby to provide security to allow the delivery of humanitarian aid. That purpose certainly was in concert with the policies of the United States for the temporary governance of Iraq after its liberation and for the relief and

reconstruction of Iraq. Moreover, the CPA certainly performed governmental functions, including some that the U.S. was responsible for as an occupying power.

Thus, after considering these questions, one must conclude that, in some respects, the CPA shares attributes with entities in *Rainwater* and *McNinch* that the Supreme Court determined were "part of 'the Government United States' for purposes of the [FCA]. *Rainwater*, *supra* at 592, and *McNinch*, *supra* at 598. In other significant respects, the CPA lacks certain attributes that the Supreme Court identified in *Rainwater* and *McNinch*. The CPA is *sui generis*.

The United States's position in this case is a narrow one, carefully tailored to the facts of this case: the CPA was a U.S. instrumentality for purposes of the FCA. We note that the CPA may have a different character in other contexts and for other purposes that are not and do not need to be addressed in this case.⁹ As we noted, the overriding purpose of the FCA is to provide a broad protection of the government from all fraudulent attempts to cause the government to pay out sums of money. The Supreme Court has held that in interpreting a remedial statute, it is appropriate to construe it broadly in such a manner as to fulfill its overall legislative purposes. *United States v. Neifert-White Co.*, *supra*; *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985); *United States v. Bacto-Unidisk*, 394 U.S. 784 (1969).

Consistent with these cases and the broad protections of funds provided by the FCA, two factors tip the scale in favor of the conclusion that the CPA should be deemed to be an instrumentality of the United States for purposes of the False Claims Act. First is the nature of

⁹ For some purposes, the CPA may also have been an instrumentality of a coalition of both the United States and the United Kingdom, but that would have no relevance to the analysis of the applicability of the FCA and hence no relevance to this case.

the appointment and supervision of Ambassador Bremer as Presidential Envoy and Administrator of the CPA. All authority of the CPA rested in the Administrator, and Ambassador Bremer was employed by the United States, served at the pleasure of the President, and was under the supervision of the President and the Secretary of Defense.

Second, coupled with the status of Ambassador Bremer, is the fact that all of the money used for the two contracts at issue in this case was spent only on the authority and control of an officer or employee of the United States or a member of the Armed Forces of the United States. As described in our opening brief, all the funds utilized for payment of the BIAP and ICE contracts were funds in which the United States had an interest or exercised certain dominion and were to be paid out, provided or approved by the United States and were ultimately presented to an officer or employee of the United States government.

Thus, while we emphasize again that the answer to the Court's latest question on the nature of the CPA is not necessary to determine whether or not defendants violated the FCA when they presented claims to the CPA under the two contracts at issue in this litigation, we nevertheless conclude that the CPA is an instrumentality of the United States for purposes of the False Claims Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2005, I caused a true and correct copy of the foregoing

SUPPLEMENTAL BRIEF OF THE UNITED STATES

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